No. 13889

In the United States Court of Appeals for the Ninth Circuit

PREFERRED INSURANCE COMPANY, A CORPORATION; MICHIGAN SURETY COMPANY, A CORPORATION; MID-STATES INSURANCE COMPANY, A CORPORATION; AND THE MERCANTILE INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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JURISDICTION

The jurisdiction of the District Court was invoked under the Federal Tort Claims Act [1] (R. 3). Its opinion is reported at 111 F. Supp. 899 (R. 22-37), *sub nom. Fidelity-Phenix Fire Insurance Company* v. *United States.*

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[1] The Act of June 25, 1948, while repealing the Federal Tort Claims Act, reenacted all of its provisions into the codification of Title 28, effective September 1, 1948 (62 Stat. 683, 862). The Tort Claims Act's basic provisions are now contained in 28 U.S.C. 1346(b) and 2671-2680.

The Court's jurisdiction rests on 28 U. S. C. 1291 by reason of notice of appeal filed June 19, 1953, from a judgment in favor of the United States entered on June 16, 1953 (R. 39).

STATEMENT

This is an appeal from a judgment dismissing a complaint by the appellant insurers against the United States under the Federal Tort Claims Act, seeking reimbursement for the proceeds of property damage policies paid to certain insured servicemen whose house trailers had been damaged by the crash of an Air Force plane.

On August 5, 1950, at approximately 10 p. m., an Air Force B-29 crashed at the Fairfield-Suisun Air Force Base in California a few seconds after its take-off from that Base (R. 19). The point of impact was near the Base's Trailer Park, containing 48 trailers owned and occupied by servicemen assigned to the base and their dependents (R. 13, 20). The trailers and household and personal belongings contained therein suffered considerable damage. Appellant insurers, whose claims are involved on the instant appeal, in accord with the terms of insurance policies issued to the trailer owners, paid them a total of $49,661 for damage to 17 trailers (R. 5-6).[2] Administrative claims for damage to the property belonging to the military personnel were also filed with the Air Force under the Military Personnel Claims Act and were "paid except for that property covered by

[2] Other insurance companies paid for the damage to the remaining trailers. Their claims, similar to those asserted by the insurers on the instant appeal, were also dismissed by the court below and are before this Court in *Fidelity-Phenix Fire Insurance Co.* v. *United States,* No. 14001; *Albert G. Whipple* v. *United States,* No. 14002; *George Stropcek* v. *United States,* No. 14003; *Government Employees Insurance Company* v. *United States,* No. 14004; and *St. Louis Fire & Marine Insurance Company* v. *United States,* No. 14005.

insurance, as provided by regulations under such statute" (R. 15).

The insurers' complaint, filed under the Federal Tort Claims Act on November 5, 1951, alleged that the crash resulted from negligent maintenance and operation of the Air Force plane (R. 5). The complaint further asserted that, by payment of the $49,661 under the policies to the servicemen, the insurers had become "subrogated to the rights of their respective insureds" against the United States to that extent (R. 6).

The United States moved to dismiss on the ground of lack of jurisdiction (R. 10). In a supporting affidavit the Government showed that the insurers' subrogation claims were for property losses of "military personnel in the United States Air Force stationed at [Fairfield-Suisun] Base in the discharge of military functions, and that all of these men were on active duty, and duly assigned to military functions, at and about the time of the said crash" (R. 11). The affidavit also showed that all of the property in question "was located on and within the said Base in an area duly assigned by competent military authority as an area for trailers in which the men slept between hours of work and that the area was under military protection." (R. 11).

The following facts with respect to the operation of the Base Trailer Park were stipulated (R. 13):

The detailed procedures controlling the operation and maintenance of the Trailer Park within the confines of the Fairfield-Suisun Air Force Base were prescribed in a Base regulation (R. 13).[3] Only "Air Force personnel

[3] For the convenience of the Court, the full text of this Base Regulation No. 30-2, issued by Brigadier General Travis on April 24, 1950, is set forth in the Appendix, *infra*, p. 26.

and their families who are assigned to" the Base were allowed to use the Trailer Park facilities (R. 13; par. 4b, Base Reg. 30-2, *infra,* p. 26). Specific assignments and termination of trailer space were made by the Base billetting officer (R. 13; par. 6a, Base Reg. 30-2, *infra,* p. 27). Assignment of trailer park space automatically terminated "when the Base ceases to be the permanent station of the individual concerned" (par. 6c(1), Base Reg. 30-2, *infra,* p. 27).

The Trailer Park was operated as a non-profit activity, with the occupants charged a monthly fee determined by the Base billetting officer and by a council appointed by the Base Commanding Officer from the members of the Trailer Park (R. 13; pars. 3b, 5a, 7, Base Reg. 30-2, *infra,* pp. 26-27. All "repairs and removal of government property [could] be made by Air Installation personnel only" (R. 14; par. 10a, Base Reg. 30-2, *infra,* p. 28). Like the rest of the Air Force Base, the Trailer Park area was under military protection and subject to the jurisdiction of military police (R. 11, 14). Military personnel in the park area could leave the Trailer Park subject to the same restrictions as other personnel stationed elsewhere on the Base (R. 14).

While the military personnel living at the Base Trailer Park were not required to live on the Base, "the surrounding area was a critical housing area" (R. 15). The Trailer Park accordingly had been set aside within the Base for use by the military personnel as a "convenience and accommodation of such personnel, [and] for the mutual benefit of the personnel and the Air Force" (R. 16). The trailers damaged in the August 5, 1950, plane crash had been "permanently placed in their positions by means of jacks or other

means for the duration of the serviceman's assignment or until assigned to other permanent duty" (R. 17).

The court below, upon consideration of the foregoing facts, ruled that the property damage sustained by the Air Force personnel was incident to their service, that their exclusive remedy was under the Military Personnel Claims Act, and that neither they nor their insurers could maintain suit for that damage under the Federal Tort Claims Act (R. 22-37). The Government's motion to dismiss was accordingly granted and the subrogation claims dismissed (R. 38).

QUESTION PRESENTED

Whether the Military Personnel Claims Act, which expressly covers "any claim against the United States * * * of military personnel * * * for damage to * * * personal property occurring incident to their service," constitutes the exclusive remedy for such property damages and therefore precludes insurers' subrogation claims under the Federal Tort Claims Act for such damages.

STATUTES INVOLVED

1. Section 1346(b) of Title 28 U. S. C. (part of the Federal Tort Claims Act)[4] provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any

[4] See footnote 1, p. 1.

employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Military Personnel Claims Act of 1945 provides in pertinent part (59 Stat. 225): [5]

> SEC. 1. The Secretary of War, and such other officer or officers as he may designate for such purposes and under such regulations as he may prescribe, are hereby authorized to consider, ascertain, adjust, determine, settle, and pay any claim against the United States, including claims not heretofore satisfied arising on or after December 7, 1939, of military personnel and civilian employees of the War Department or of the Army, when such claim is substantiated, and the property determined to be reasonable, useful, necessary, or proper under the attendant circumstances, in such manner as the Secretary of War may by regulation prescribe, for damage to or loss, destruction, capture, or aban-

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[5] The Military Personnel Claims Act was amended, subsequent to the crash which gave rise to the claims involved in the instant case, on July 3, 1952 (66 Stat. 321) and on August 1, 1953 (67 Stat. 317). The first amendment expressly extended the Act to Air Force personnel claims. The 1953 amendment enlarged the time for filing of certain claims.

At the time of the crash involved here and before the 1952 amendment making the Military Personnel Claims Act expressly applicable to claims by Air Force personnel, the functions of the War Department with respect to Air Force personnel claims under the Military Personnel Claims Act had been transferred to the Secretary of the Air Force by the National Security Act of 1947 (61 Stat. 495, 501, 503; 5 U.S.C. 626). That Act changed the title of the Secretary of War to Secretary of the Army and created the Department of the Air Force and its head, the Secretary of the Air Force. It also provided for the transfer of appropriate functions from the Secretary of the Army to the Secretary of the Air Force (61 Stat. 503).

donment of personal property occurring incident to their service, or to replace such personal property in kind: *Provided,* That the damage to or loss, destruction, capture, or abandonment of property shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee, and shall not have occurred at quarters occupied by the claimant within continental United States (excluding Alaska) which are not assigned to him or otherwise provided in kind by the Government. No claim shall be settled under this Act unless presented in writing within one year after the accident or incident out of which such claim arises shall have occurrel: *Provided,* That if such accident or incident occurs in time of war, or if war intervenes within two years after its occurrence, any claim may, on good cause shown, be presented within one year after peace is established. Any such settlement made by the Secretary of War, or his designee, under the authority of this Act and such regulations as he may prescribe hereunder, shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary.

SEC. 2. Such appropriations as may be required for the settlement of claims under the provisions of the Act of March 3, 1885 (23 Stat. 350), as amended, shall be available for the settlement of claims under the provisions of this Act.

SEC. 3. Sections 3483-3488 of the Revised Statutes (31 U.S.C. 209-214), and the Act of March 3, 1885 (23 Stat. 350), as amended by the Act of July 9, 1918 (40 Stat. 880), and by the Act of March 4, 1921 (41 Stat. 1436; 31 U.S.C. 218-222), and by section 6 of the Act of July 3, 943 (57 Stat. 374; 31 U.S.C. 222a, 222b), are hereby repealed.

ARGUMENT

For nearly a century before the Federal Tort Claims Act became law in 1946, Congress, through a long series of enactments, had provided a detailed and comprehensive system of administrative compensation for property damage or loss sustained by military personnel incident to their service. Congressional reexamination of these numerous statutes disclosed the need for coordinating their various provisions and resulted in the Military Personnel Claims Act of 1945. In Point I we show that this 1945 Act is the exclusive remedy for damage or loss of property of a member of the Armed Forces incident to his service and thus precludes his recovery of damages under the Federal Tort Claims Act.

We further show in Point II that the exclusiveness of this Military Personnel Claims Act remedy bars suit under the Federal Tort Claims Act not only by the serviceman, but under settled principles of subrogation, by his insurer.

I

The Military Personnel Claims Act Remedy Precludes an Action by a Member of the Armed Forces under the Federal Tort Claims Act for Property Damage Incident to His Service

Almost one hundred years before the enactment of the Federal Tort Claims Act in 1946, Congress had established a system for compensating servicemen for personal property damage incident to their service. As early as 1849, Congress made express provision for payment by the Government of various types of property damage incident to the claimant's military service. Act of March 3, 1849, 9 Stat. 415. This statute was the first in a long series of many Congressional enactments, developing an administrative settlement system for such property damage claims. See, *e.g.*, Act of March 3,

1863, 12 Stat. 743; Act of March 3, 1885, 23 Stat. 350; Act of July 9, 1918, 40 Stat. 880; Act of March 4, 1921, 41 Stat. 1436; Act of July 3, 1943, 57 Stat. 374.

In 1945, Congress reexamined these numerous statutes under which a detailed settlement system had developed. The need for consolidation and coordination of the various statutory provisions authorizing administrative payment of incident-to-service property damage claims was apparent. H.R. 2068, later enacted as the Military Personnel Claims Act of 1945, was accordingly introduced at the first session of the 79th Congress. 91 Cong. Rec. 975. Both the House and Senate Committees on Claims, reporting H.R. 2068 out favorably, stated:

> The purpose of the proposed legislation is to provide a single, clear, definite, and workable statute for the settlement of claims of military personnel and civilian employees of the War Department or of the Army for the loss of their personal property incurred while in the service and to repeal certain statutes which have been found to be obsolete or unworkable and not appropriate to present conditions. (H. Rept. 237, 79th Cong., 1st sess., p. 1; S. Rept. 276, 79th Cong., 1st sess., p. 2; see 91 Cong. Rec. 1540, 3990, 4690.)

Within two weeks after being reported out by the Senate Committee, this proposed "single, clear, definite, and workable statute" for the settlement of service-incident property damage claims became law as the Military Personnel Claims Act of 1945.[6] 91 Cong. Rec. 4804, 5445.

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[6] This 1945 Act, as noted by the court below (R. 28), completed the original plan for consolidation into three separate statutes of all of the statutory settlement provisions affecting the Armed Forces.

A. *The Remedy under the Military Personnel Claims Act Is Exclusive for All Service-Incident Property Damage Claims*

It is familiar law that where Congress, over a long period of time and through a series of enactments has

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H. Rept. 237, 79th Cong., 1st sess., p. 3; S. Rept. 276, 79th Cong., 1st sess., p. 3. The first two statutes, the Foreign Claims Act (57 Stat. 666) and the Military Claims Act (57 Stat. 374), were enacted in 1943. In referring to these two statutes and the need for enacting H.R. 2068 as the third and final statute, Secretary of War Patterson pointed out (H. Rept. 237, 79th Cong., 1st sess., p. 4):

> By the passage of the act of April 22, 1943 (57 Stat. 66), commonly refered to as the Foreign Claims Act, the Congress made available to the War Department a thoroughly satisfactory and workable basis for the settlement of claims for damage caused by our armed forces in foreign countries.
>
> The next forward step came with the passage of the act of July 3, 1943, which consolidated all then existing statutory provisions for the administrative settlement of claims other than claims under the Foreign Claims Act and claims of War Department and Army personnel.
>
> The only field of statutory authorization with respect to military claims which has not been modernized to meet present conditions is that covering the claims of military personnel and civilian employees of the War Department or of the Army for damage to or loss, destruction, capture, or abandonment of personal property occurring incident to their service. Fair, just, and prompt administrative processing of these claims is of paramount importance, especially in time of war. The manner in which such claims are handled and the length of time required to effect payment or other final action has a direct effect upon morale in the Army and upon relatives and friends on the home front. At the present time, members of our armed forces and civilian employees of the War Department or of the Army stationed in all parts of the world are continuously subjected to hazards which result in loss, damage, or destruction of their personal property. It has become apparent that there is urgent need for new legislation to effect a fair, equitable, and uniform basis for the settlement of such claims.
>
> Enactment of the enclosed bill would make possible the settlement by disapproval, replacement in kind, or payment in money, of claims for damage to or loss, destruction, capture, or abandonment of personal property coming within the provisions thereof to be effected, after appropriate investigation and recommendation, by the Secretary of War, with power to delegate such authority in appropriate classes of cases and under applicable Army regulations.

legislated with respect to a particular subject matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application, which would otherwise apply, are held to be inapplicable to the special subject matter. *United States* v. *Barnes,* 222 U.S. 513, 520 (1912); *United States* v. *Sweet,* 245 U.S. 563 (1918); *Ozawa* v. *United States,* 260 U.S. 178, 193, 194 (1922); *United States* v. *Jefferson Electric Co.,* 291 U.S. 386, 396 (1934); *Missouri* v. *Amer. Trucking Ass'ns,* 310 U.S. 534, 544 (1940).

It is equally settled that the foregoing rule is fully applicable in determining whether the Federal Tort Claims Act, concededly a statute of general application, is to be construed so as to authorize recovery of damages on claims already covered by a detailed and statutory compensation system. In *Feres* v. *United States,* 340 U.S. 135, 140 (1950), the Supreme Court held the Tort Claims Act inapplicable to claims by servicemen for service-incident injuries because a "comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute." Justice Jackson, speaking for a unanimous court, pointed out that

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. [340 U. S. 135, 140.]

Showing that that purpose would in no way be served by affording servicemen alternative damages under the Tort Claims Act, the opinion emphasizes the "bearing upon it [of] enactments by Congress which provide

systems of simple, certain, and uniform compensation." 340 U. S. 135, 144.

That the existence of a clear and definite compensation system was the *ratio decidendi* of the *Feres* exclusion from the Federal Tort Claims Act of servicemen's claims is made even more apparent by the later Supreme Court decisions interpreting and applying the *Feres* case. In *Johansen* v. *United States,* 343 U. S. 427 (1952), the Supreme Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries for which damages were sought there was no express declaration in the Federal Employees Compensation Act that the remedies thereunder were exclusive. Relying on *Feres* and as if to eliminate all doubt that the Supreme Court viewed its *Feres* holding as being based on the "exclusive character" of the compensation system, the *Johansen* opinion states (343 U. S. 527, 440, 441):

> * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States,* 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.
>
> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to

> that system without specific legislation to that effect.

Shortly thereafter, in *Dalehite* v. *United States,* 346 U. S. 15 (1953), the Court again reiterated the basis for its decision in the *Feres* case by pointing out that it was "the existence of the uniform compensation system" which "led us [in the *Feres* case] to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law." 346 U. S. 15, 31, note 25.

The courts of appeals have also applied the *Feres* case in holding that the existence of a clear and definite scheme of special statutory compensation precludes resort to a tort action against the United States. Thus, in *Lewis* v. *United States,* 190 F. 2d 22 (1951), certiorari denied, 342 U. S. 869, the District of Columbia Court of Appeals held that a U. S. Park policeman whose compensation statute, like that of the employees in *Johansen* and the servicemen in *Feres,* contained no express declaration of exclusiveness, was nevertheless barred by virtue of the compensation statute from maintaining a Tort Claims Act suit against the United States. After quoting the Supreme Court's language in *Feres* as to the importance of "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services," the court of appeals observed (190 F. 2d 22, 23):

> By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment en-

> titled "to all the benefits of relief and retirement" furnished by the "Policemen's and Firemen's Relief Fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * *

Similarly, in *O'Neil* v. *United States,* 202 F. 2d 366 (C. A. D. C.) (1953), the court, holding that the claimants' eligibility for compensation benefits precluded a Tort Claims Act suit, stated (202 F. 2d 366, 367):

> * * * we think the basic principle of the [*Feres*] case covers this appeal. In Johansen v. United States, 343 U. S. 427, 439, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. United States * * *."

This Court's recent decision in *United States* v. *Firth,* 207 F. 2d 665 (1953) takes the identical view. In directing the dismissal of a wrongful death action filed against the United States under the Public Vessels Act, this Court, relying on the *Johansen* case, which as we have shown was itself based on the *Feres* principle of the exclusive character of the compensation remedy, pointed out that the decedent's heirs must look to the Federal Employees Compensation Act for relief. And the Seventh Circuit Court of Appeals, in directing that a Tort Claims Act complaint against the United States

be dismissed and that the claimant be remitted to his compensation remedy, also pointed out that *Johansen,* resting on the *Feres* principle of exclusiveness of the compensation remedy, "is decisive of the question of exclusiveness of remedy afforded by the Federal Employees Compensation Act." *Sasse* v. *United States,* 201 F. 2d 871, 873 (1953).[7]

The uniform holdings of the cited cases show that where the Government has set up a statutory system allowing administration disposition of claims, that remedy is exclusive.[8] Since the Military Personnel Claims Act applies to service-incident property damage claims, we submit that the rule applied by the Supreme Court in the *Feres* and *Johansen* cases requires affirmance of the lower court's dismissal of the instant Tort Claims Act suit if the instant property damage claims were incident to the military service of the trailer owners. To that question we now turn.

B. *The Property Damage Claims Involved Here Were Service-Incident in Nature*

The Military Personnel Claims Act of 1945 authorizes payment of claims only where the loss or damage of personal property belonging to members of the armed

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[7] Identical considerations have compelled other courts considering various other types of legislation permitting suit against the United States to hold that the administrative compensation remedy precludes alternative relief under the statute authorizing suit. *Dobson* v. *United States,* 27 F. 2d 807 (C.A. 2) (1928), certiorari denied, 278 U.S. 653; *Bradey* v. *United States,* 151 F. 2d 742 (C.A. 2) (1945), certiorari denied, 326 U.S. 795.

[8] This exclusiveness, despite appellants' suggestion to the contrary, is not dependent on the claimant's individual eligibility for an administrative recovery. The *Feres and Johansen* principle of exclusiveness of the compensation plan applies in all cases where the claim falls within the class generally cognizable under the administrative scheme, even though the claimant, for special circumstances, may be denied administrative compensation in a particular case. *Underwood* v. *United States,* 207 F. 2d 862 (C.A. 10) (1953).

forces "occurr[ed] incident to their service." Section 1, *supra,* p. 7. The record shows that claims for loss of property in the crash involved in the instant case were "submitted under the Military Personnel Claims Act of 1945 (31 U. S. C. 222c)" and paid by the Air Force in accord with the provisions of that Act (R. 15, 18, 20). These payments by the Air Force were necessarily predicated on an administrative determination that the damages paid for by the Government occurred incident to the claimants' military service. And such a determination is, by the express language of Section 1 of the Military Personnel Claims Act, "final and conclusive for all purposes, notwithstanding any other provision of law to the contrary."[9] Section 1, *supra,* p. 7.

The Air Force determinations that (1) the claims involved were incident to the service of the military personnel whose property was destroyed in the crash and (2) that the claims fall under the exclusive remedy provision of the Military Personnel Claims Act are therefore binding and not subject to judicial review. Cf. *United States* v. *Babcock,* 250 U. S. 328, 331 (1919); *Dismuke* v. *United States,* 297 U. S. 167, 171 (1936); *Stark* v. *Wickard,* 321 U. S. 288, 306 (1944). But even if the "incident-to-service issue" were open to decision *res nova,* there would be no doubt as to the correctness of the Air Force ruling on the question.

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[9] It is significant that an identical provision, according finality and conclusiveness to Air Force determinations under the Military Personnel Claims Act, was re-incorporated in Section 1(c) of the 1952 revision of that Act. 66 Stat. 321, 323.

This binding administrative determination that the claims here involved were service-incident distinguishes the instant case from *Lund* v. *United States,* 104 F. Supp. 756 (D. Mass. 1950), where no such determination was made. Nor is the *Lund* case supported by the various JAG opinions cited by appellants. Obviously the "service-incident" issue is largely a factual one, and the JAG opinions turn on the facts peculiar to them.

Appellants recognize that the property damage claims in this case must be considered as having been "incident to [military] service" if they "arose out of or in the course of activity incident to the service of the [military] personnel concerned." Appellants' Brief, p. 57. The language "arising out of or in the course of activity incident to the service" paraphrases the established concept of "arising out of and in the course of employment" in workmen's compensation law. And the Supreme Court's use in *Feres* v. *United States* of the terms "incident to service" and "arising out of or in the course of activity or duty" interchangeably and its likening of the military benefits to workmen's compensation benefits throughout the opinion (340 U. S. 135, 138, 143, 144, 145, 146) confirm the need for defining "incident to service" in the same manner as "arising out of and in the course of employment" is understood and applied in the field of workmen's compensation.

Less than three months after indicating in *Feres* that "incident to service" means "course of employment" as defined for workmen's compensation purposes, the Supreme Court reiterated the settled principles underlying that definition. In *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504, 506-507 (1951), the Court, holding that the death of the employee in that case occurred within the course of his employment despite the fact that he was then on leave and not actively on duty or directly advancing his employers' interests, stated:

> The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 U. S. C. § 902(2). * * * Workmen's compensation is not con-

> fined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.,* 218 N. Y. 248, 251, 112 N. E. 727, 728. *The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Tom v. Sinclair (1947) A. C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.* * * * (Emphasis supplied.)

In other words, "The basic thing" is that an incident of his employment places the claimant in a position where he is surrounded with conditions giving rise to the claim. *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F. 2d 11, 14 (C. A. D. C.) (per Mr. Justice Rutledge) (1940), certiorari denied, 310 U. S. 649; see also *Leonbruno* v. *Champlain Silk Mills,* 229 N. Y. 470, 128 N. E. 711 (per Mr. Justice Cardozo) (1920).

That their military employment placed the service personnel in the "zone of special danger" and surrounded them with the conditions giving rise to the instant claims cannot seriously be challenged. It was only because the servicemen, whose trailers were destroyed, were members of the Air Force assigned to the Fairfield-Suisun Air Force Base that they were allowed to make use of the Trailer Park facilities at that Base. *Supra,* p. 3. Obviously, use of these facilities, in view of the regularly heavy air traffic at any Air Force Base, surrounded the servicemen with the precise conditions out of which the instant claims arose. Since it was the servicemen's military status which placed

them in the "zone of special danger," the instant claims must be viewed as having arisen out of or in the course of their military employment and incident to their service.

It is true, as appellants point out, that the military personnel were not compelled or directed to live in the Base Trailer Park. But, as appellants also note, "the surrounding area was a critical housing area." Appellants' Brief, p. 3; R. 15. Other trailer park accommodations were obviously not available within a reasonable distance. In similar situations arising under the workmen's compensation laws, it has been held that the claims arose as an "incident" to the claimants' emlpoyment, despite the fact that they were not ordered or required to live on the employers' premises. *Allen* v. *D. D. Skousen Const. Co.,* 55 N. Mex. 1, 225 P. 2d 452 (1950); *Wilson Cypress Co.* v. *Miller,* 157 Fla. 459, 26 S. 2d 441 (1946). Thus, even apart from the binding effect of the Air Force determination that the instant claims are "service-incident," the uniform holdings of the cited cases eliminate any doubt that these claims "arose out of or in the course of" military activity and "incident to the service" of the Air Force personnel involved.

II

Since Subrogation Is a Derivative Right, a Serviceman's Insurer Cannot Maintain an Action under the Federal Tort Claims Act for Property Damage Incident to the Insured's Service

In Point I we have shown that the instant claims are for property damages occurring incident to the military service of the Air Force personnel who owned the trailers, that their exclusive remedy is the Military Person-

nel Claims Act, [10] and that any action by the servicemen under the Federal Tort Claims Act would therefore be barred. We show now that the instant subrogation actions by the appellant insurers are likewise barred.

The doctrine that "One who rests on subrogation stands in the place of one whose claim he has paid" is fundamental in our law. *United States* v. *Munsey Trust Co.,* 332 U. S. 234, 242 (1947). Subrogation is a derivative right and invests the insurer with only those rights the insured has against the defendant. *Phoenix Insurance Co.* v. *Erie Transportation Co.,* 117 U. S. 312 (1886); *Wager* v. *Providence Insurance Company,* 150 U. S. 99, 108 (1893); *Standard Marine Ins. Co.* v. *Assur. Co.,* 283 U. S. 284, 286 (1931).

It is for that reason that where the insured cannot bring suit against the United States, suit by his insurer is also prohibited.[11] This identical issue has been decided by the Court of Appeals for the Second Circuit in

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[10] Appellants argue that the Army and Air Force have not viewed the Military Personnel Claims Act as exclusive, but have allowed military claimants the right to elect to proceed under either that Act or the Military Claims Act (57 Stat. 372, as amended). Appellants' Brief, pp. 12, 17. The short answer to this argument is that the official Regulations promulgated by the Army and Air Force recognize the exclusive nature of the Military Personnel Claims Act remedy. Thus, the Army regulations expressly state that, wherever applicable, its regulations under the Military Personnel Claims Act "are used to the exclusion of all other regulations" issued by the Army under the Military Claims Act or any other act. 32 C.F.R. 536.3. Similarly, the Air Force regulations provide that its regulations under the Military Personnel Claims Act are "preemptive of other claims regulations" of the Air Force. 32 C.F.R. 836.103.

[11] *United States* v. *Aetna Surety Co.,* 338 U.S. 366 (1949), in no way authorizes a subrogation claim under the Federal Tort Claims Act where the insured is barred from maintaining such a suit. To the contrary, that opinion fully recognizes that an insurer may sue under the Tort Claims Act only "upon a claim to which it has become subrogated *by payment to an insured who would have been able to bring such an action.*" (Emphasis supplied.) 338 U.S. 366, 368.

a situation where the insurer claimed subrogation rights through Defense Supplies Corporation against the United States. *Defense Supplies Corporation* v. *United States Lines Co.,* 148 F. 2d 311 (1945). There, in affirming a dismissal of a suit on behalf of the insurer against the United States on the ground that Defense Supplies Corporation itself could not maintain such a suit, the court of appeals ruled (148 F. 2d 311, 312):

> The threshold question is whether the Defense Supplies Corporation may bring suit against the United States under the Suits in Admiralty Act. We recognize the fact that the real parties in interest are the insurance companies. But their right to sue is dependent upon the right of the party to whom they are subrogated.
>
> * * * * *
>
> It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And Section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act.

Accord: *Defense Supplies Corporation* v. *American-Hawaiian S. S. Corp.,* 64 F. Supp. 459, 470 (S.D. N.Y.)

(1945). In the latter cases, Defense Supplies Corporation's lack of capacity to sue the United States precluded its insurer from maintaining such a suit. In the instant case, since the exclusiveness of the Military Personnel Claims Act remedy bars the servicemen whose trailers were destroyed from maintaining Federal Tort Claim Act suits against the United States, it similarly follows that appellant insurers' subrogation claims under that Act must also fail.

No departure from these settled subrogation principles is warranted because the Military Personnel Claims Act, which authorizes payment of claims of "military personnel," has been interpreted to be limited to claims filed by servicemen on their own behalf and to exclude from its coverage "losses of insurers and other subrogees" and "losses * * * recovered or recoverable from an insurer." 32 C.F.R. 836.93(i) and (j).[12] The limitation in these regulations obviously means that the United States agrees to make payment under the Military Personnel Claims Act to servicemen only on con-

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[12] The legislative history of the 1952 amendment to the Military Personnel Claims Act of 1945 demonstrates full Congressional awareness and approval of the administrative interpretation barring insurers from the benefits of the Military Personnel Claims Act. This interpretation was placed squarely before Congress when H.R. 404, 82d Cong., 2d sess., later enacted as the 1952 amendment was being considered. A copy of the administrative regulations setting forth this administrative interpretation of the Military Personnel Act appears in full in S. Rept. 1691, 82d Cong., 2d sess., p. 3, and specifically includes among the "claims not payable":

> i. Losses of subrogees.—Losses of insurers and other subrogees.
>
> j. Losses recoverable from insurer.—Losses, or any portion thereof, which have been recovered or are recoverable from an insurer.

Notwithstanding the fact that its attention was specifically directed to the administrative ban against payment of claims to

dition that the United States is to have the full benefit of any insurance effected on the property by servicemen with their private insurers. Far from supporting appellants' claims here, the presence of this condition constitutes an additional and independent basis for the insurers' inability to maintain the present Tort Claims Act suit against the United States.

Ever since *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U.S. 312 (1886), it has been recognized that such a condition is fully effective as against the insurer. In that case, a shipper's goods were destroyed in transit. A condition in the bill of lading provided that the carrier was to have the full benefit of any insurance effected upon the goods by the shipper with any insurer. The insurer, after paying the shipper the loss under the policy, claimed to be subrogated to the shipper's rights against the carrier. In sustaining, as against the insurer, the validity of the condition in the bill of lading, the Supreme Court observed (117 U.S. 312, 321):

> The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful

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insurers, Congress in no way modified that limitation. Instead, the 1952 amendment eliminated an entirely unrelated limitation concerning property damage claims on behalf of servicemen who died prior to the property damage loss. Apart from all other considerations, Congressional enactment of H.R. 404 into the 1952 amendment with full awareness that insurers' claims had regularly been rejected administratively but without any modification of that administrative interpretation, constitutes, we submit, an acceptance and ratification by Congress of the administrative interpretation barring insurance claims under the Military Personnel Claims Act. See *Fleming* v. *Mohawk Co.,* 331 U.S. 111 (1947); *Brooks* v. *Dewar,* 313 U.S. 354 (1941).

> contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

In the same case the Court further noted (117 U.S. 312, 325):

> As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

All other cases are in accord in holding that an insurer's claim to subrogation rights cannot be recognized where the carrier has contracted with the owner that the carrier shall have the benefit of any insurance effected by the owner. *Great Lakes Corp.* v. *S. S. Co.*, 301 U.S. 646, 654 (1937); *National Garment Co.* v. *New York, C. & St. L. R. Co.*, 173 F. 2d 32, 37 (C.A. 8) (1949); see 18 Comp. Gen. 203 (1938). We submit that the reasoning of the cited authorities is applicable here and fully warrants the conclusion that the condition in the Military Personnel Claims Act regulations giving the United States the benefit of insurance taken out by servicemen, prevents recognition of appellant insurers' subrogation claims.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX

HEADQUARTERS
9TH BOMBARDMENT WING, HEAVY
FAIRFIELD-SUISUN AIR FORCE BASE
Fairfield, California

BASE REGULATION)
NUMBER 30-2)

PERSONNEL

FAIRFIELD-SUISUN TRAILER PARK

(This regulation supersedes Base Regulation 85-8, 11 October 1949)

1. PURPOSE: The purpose of this regulation is to provide for the operation and maintenance of a trailer park at this station.

2. SCOPE: This regulation is applicable to all occupants of the Base Trailer Court and personnel connected with the court in a supervisory or administrative capacity.

3. GENERAL: The Fairfield-Suisun Trailer Park will be operated as a non-profit activity at minimum expense to the Government.

4. LOCATION AND USE OF THE TRAILER PARK:

a. The Fairfield-Suisun Trailer Park will be located in the area South of Fairfield Avenue opposite the T-700 Block.

b. The Trailer Park facilities will be for the use of Air Force Personnel and their families who are assigned to this station and who own and occupy their own factory-built or equivalent trailer home and are assigned trailer space at the park.

5. Administration of the Trailer Park and the Trailer Park Association Fund:

a. The Trailer Park fund will be operated and administered by the Base Billeting Officer. A council appointed by the Commanding Officer, 9th Air Base Group, from the members of the Trailer Park will act as advisors to the Custodian.

b. Administrative procedures will be in accordance with AF Regulation 176-1 and 176-2.

6. Assignment and Termination of Assignment of Trailer Spaces:

a. Assignments and terminations of trailer spaces will be made by the Base Billeting Officer.

b. Trailer spaces will normally be assigned according to date of application. Priority will be given to persons holding positions as listed in Par 3d, Base Regulation 35-12.

c. Assignment of trailer park space will be terminated under the following conditions:

(1) When the base ceases to be the permanent station of the individual concerned.

(2) Upon failure to pay monthly fee.

(3) At such times as dependents no longer reside with officer or airman.

(4) At the discretion of the Base Commander when the conduct of occupant or dependent personnel warrant such action.

7. Trailer Park Space Fee: Occupants will be charged a monthly fee, to be determined by the Base Billeting Officer and the Council. Charges for utilities will be determined by Air Installations and forwarded to the Base Billeting Officer for collection.

8. Police of the Trailer Park:

a. Occupants will be responsible for police of the area surrounding space occupied.

b. Spaces which are not occupied will be policed jointly by occupants nearest unoccupied spaces.

c. Garbage and trash will be disposed of in containers provided.

d. Latrine facilities will be thoroughly policed daily and kept in satisfactory condition by a janitor chosen by the Council from a list of applicants residing in the Trailer Park. This janitorial service will be operated on a monthly basis whereby a new applicant will be selected each month. Members are required to use reasonable care to help keep the premises in good condition.

9. Speed Limit Within the Trailer Park Area:

a. The speed limit within the trailer park area will be ten (10) miles per hour.

b. Extreme caution will be exercised by all drivers of motor vehicles within the area as a further means of controlling traffic and protecting the lives of children using the area as a playground.

10. Repair and Removal of Government Property:

a. All repairs and removel of government property will be made by Air Installations personnel only.

b. Requests for such work will be submitted by the Base Billeting Officer.

c. Approval will be secured from Air Installations before erecting structures in or near the Trailer Park Area.

11. Regulations Governing Sanitation, Pets, Etc.: The Fairfield-Suisun Trailer Park is a residential area and all existing regulations governing sanitation, pets, etc., will be observed by occupants and their guests.

By Command of Brigadier General Travis:

Andrew Zerbe,
Major, USAF,
Adjutant General.

Official:

(S.) Andrew Zerbe,
Major, USAF,
Adjutant General.

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